UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

----------X

BRIAD WENCO, LLC

Employer,

and

FAST FOOD WORKERS COMMITTEE

Case No. 29-CA-165942

Union.

----------X

CHARGING PARTY FAST FOOD WORKERS COMMITTEE'S ANSWERING BRIEF TO RESPONDENT BRIAD WENCO'S EXCEPTIONS

Ceilidh B. Gao
Levy Ratner, P.C.
80 Eighth Avenue Floor 8
New York, NY 10011-5126
(212) 627-8100
(212) 627-8182 (fax)
cgao@levyratner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

Simply put, the Employer's Exceptions are a naked attempt to rehash arguments presented to Administrative Law Judge ("ALJ") Joel P. Biblowitz that have repeatedly been rejected by the Board in *D.R. Horton* and its progeny. ALJ Biblowitz properly rejected these arguments in his July 6, 2016 Decision ("Decision") finding that Respondent Briad Wenco, LLC ("Employer") has maintained arbitration agreements (collectively, "Agreement") that unlawfully restrict employees' rights to engage in concerted legal action and are reasonably construed to restrict employees' rights to access the NLRB.

The Board has made clear in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), that the right to concerted legal action is a substantive Section 7 right that cannot be modified or waived by individual agreement. The Employer's Agreement clearly contains such a waiver and, therefore, ALJ Biblowitz correctly decided it is unlawful.[1] Furthermore, ALJ Biblowitz properly determined that the Agreement is independently

[1] The Employer has also excepted to the ALJ's finding that employees were required to agree to the terms set forth in the Arbitration Agreements in order to become or remain employees. (Briad Wenco LLC's Exceptions, Exception No. 6.) The Board has made clear in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015), that an agreement that waives concerted legal action is unlawful and contrary to the policies of the National Labor Relations Act whether a mandatory condition of employment or voluntarily entered into by the parties. The Board was clear: "it is the individual *agreement* itself not to engage in concerted activity that threatens the statutory scheme; whether the agreement was imposed or entered into voluntarily is beside the point." *Id.* at 7. *See also Adriana's Insurance Services, Inc.* 364 NLRB No. 17, fn. 3 (2016) ("an arbitration agreement that, as applied, precludes collective action in all forums is unlawful even if entered into voluntarily"); *Adecco USA, Inc.*, 364 NLRB No. 9, slip op. at 10 (2016) ("even assuming that an opt-out provision renders an arbitration agreement not a condition of employment… an agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right"); *ZEP, Inc.*, 363 NLRB No. 192, slip op. at 2 (2016) ("an arbitration policy that precludes collective action in all forums is unlawful even if entered into voluntarily"); *Nijjar Realty, Inc.*, 363 NLRB No. 38, slip op. at 7 (2015) ("an arbitration agreement precluding collective action in all forums is unlawful even if entered into voluntarily"); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) ("non-mandatory agreements are contrary to the National Labor Relations Act and to fundamental principles of federal labor policy");
[Footnote continues on next page]

unlawful as it is reasonably construed to prohibit employees from filing charges with the National Labor Relations Board. Accordingly, the Charging Party respectfully requests that the Board deny the Employer's exceptions and adopt ALJ Biblowitz's decision.

POINT I.
THE ALJ CORRECTLY DETERMINED THAT THE AGREEMENT IS UNLAWFUL AS IT REQUIRES EMPLOYEES TO PROSPECTIVELY WAIVE THEIR SECTION 7 RIGHTS TO ENGAGE IN CONCERTED ACTIVITY

The Employer excepts to ALJ Biblowitz's finding that the Agreement requires employees to waive their right to collectively pursue employment related litigation and is therefore unlawful. (Decision 11:6-12:2). As *D.R. Horton* and its progeny make clear, the right to concerted *legal* action is a substantive right under the NLRA, not merely a procedural right. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015). The "right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 7 (2014) (emphasis in original) citing 357 NLRB No. 184, slip op. at 11 (2012). Accordingly, "employers may not compel employees to waive their NLRA rights to collectively pursue litigation of employment claims" through arbitration agreements. *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 12 (2012).

Here, ALJ Biblowitz found that the Agreement plainly involves the type of substantive NLRA right at issue in *D.R. Horton, Murphy Oil*, and *On Assignment Staffing* – the right to

---

Haynes Building Services, LLC, 363 NLRB No. 125, fn. 12 (2016) ("an arbitration agreement that precludes collective action in all forums is unlawful whether mandatory or not"). Accordingly, regardless of the Employer's exception to the ALJ's finding that the agreement was a term and condition of employment, the Employer's maintenance of the Agreement is unlawful.

pursue concerted legal action regarding terms and conditions of employment. The Agreement covers "[a]ny claim, controversy or dispute… arising from or relating to my employment." Joint Ex. 2, Attached Ex. 1, 2, 3 ¶ 1. The Agreement states that these covered claims include "claims alleging discrimination or harassment," "retaliation claims," "claims for wages or other compensation," and "any other claims alleging any violation of any federal, state, local or other governmental law, statute, regulation, or ordinance." *Id.*, ¶ 2. Finally, the Agreement waives any right to concerted, collective or class pursuit of such claims:

> The Company and I agree that any and all claims subject to arbitration under this Agreement will be instituted only in an individual capacity, and not as a representative plaintiff on behalf of any purported class, collective or consolidated action. It is the parties' intent to the fullest extent permitted by law to waive any and all rights to the application of class or collective action procedures or remedies to arbitration proceedings conducted under this Agreement, and it is expressly agreed between the Company and me that any arbitrator adjudicating claims under this Agreement shall have no power or authority to adjudicate class, collective or consolidated claims. Furthermore, the Company and I agree that neither can join or participate as a member of a class or collective action that may have been instituted in court or in arbitration by a third-party in order to pursue any claims that are subject to arbitration under this Agreement.

Id. ¶ 12. The Board has "consistently held that concerted legal action addressing wages, hours or working conditions" is protected Section 7 activity. *D.R. Horton*, 357 NLRB No. 184, 2278 (2012). As in *D.R. Horton*, *Murphy Oil*, and progeny, ALJ Biblowitz found that the Agreement restricts precisely that right to concerted legal action and the Employer's maintenance of the agreement is a violation of Section 8(a)(1).

In its Exceptions, the Employer again asserts that arbitration agreements waiving the right to pursue collective legal action are not violations of the Act under relevant jurisprudence. This assertion is inaccurate and was properly rejected by ALJ Biblowitz. As noted by ALJ Bibliowitz (Decision 11:22-48), in *Murphy Oil*, the Board reaffirmed *D.R. Horton* after explicitly addressing and rejecting arguments regarding the Federal Arbitration Act and circuit court

decisions disapproving of *D.R. Horton*. 361 NLRB No. 72, slip op. at 5-15 (2014). Furthermore, ALJ Biblowitz also noted that the Seventh Circuit recently agreed with the Board and found that restrictions on class, collective or representative proceedings violate the Act. *Jacob Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). Finally, the Board's policy of non-acquiescence dictates that Board precedent is binding, regardless of contrary decisions by courts of appeals, unless and until the issue is definitely resolved by the Supreme Court. *See* NLRB Division of Judges Bench Book: An NLRB Trial Manual. Sec. 11–300. (2010) ("The judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals) citing *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960,962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964)").

Thus, ALJ Biblowitz applied established Board law to the undisputed facts and correctly determined that the Employer's Agreeement violates the Act by requiring employees to prospectively waive their Section 7 right to engage in collective legal action.

POINT II.
THE ALJ CORRECTLY FOUND THAT THE AGREEMENT IS UNLAWFUL AS IT RESTRICTS EMPLOYEES' RIGHTS TO FILE OR PARTICIPATE IN THE BOARD'S PROCESSES

The Employer also excepts to ALJ Bibliowitz's finding that the Agreement independently violates Section 8(a)(1) by interfering with employees' rights to file charges with the Board. This exception is similarly without merit. The Board has long held under the framework of *Lutheran Heritage* that where a reasonable employee would construe an agreement to prohibit the filing of Board charges, such agreements are unlawful. *Supply Technologies, LLC*,

359 NLRB No. 38, slip op. 1-4 (2012) (agreement mandating that employees "bring any claim of any kind" to arbitration reasonably understood to prohibit filing of unfair labor practice charges); *2 Sisters Food Group*, 357 NLRB 1816, 1816-1817 (2011) (policy requiring employment disputes be submitted to arbitration reasonably understood to include filing of unfair labor practice charges); *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd 255 F.Appx. 527 (D.C. Cir. 2007) (arbitration agreement covering all disputes arising out of employment reasonably read to prohibit access to NLRB). The Board has also held repeatedly that even where an agreement states an exception for filing charges with the NLRB, a reasonable employee still may interpret the agreement to prohibit the filing of Board charges. *Lincoln Eastern Management Corp.*, 364 NLRB No. 16 (2016); *SolarCity Corp.*, 363 NLRB No. 83 (2015). As the Board stated in *SolarCity*, in examining agreements, the Board must "recognize – as the Board has done before – that rank and file employees do not generally carry lawbooks to work… and cannot be expected to have the expertise to examine company rules from a legal standpoint." 363 NLRB No. 83, slip op. 5 (2015) (internal citations and quotations omitted).

In *Lincoln Eastern*, the employer's arbitration agreement explicitly excluded NLRB claims, stating "nothing in this policy is intended to prevent you from filing any claims for relief under the National Labor Relations Act with the National Labor Relations Board or any other appropriate administrative agency related to your employment claims." 364 NLRB No. 16, slip op. 1-2 (2016). Similarly in *SolarCity Corp.*, the arbitration agreement excepted NLRB claims, stating "this Agreement does not prohibit me from pursuing… claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws… Such permitted agency claims include filing a charge or complaint with [the National Labor

Relations Board]." 363 NLRB No. 83, slip op. 15 (2015). Despite these savings clauses, the Board nonetheless found that a reasonable employee would interpret the agreements, as a whole, to limit participation in the Board's process.

In *SolarCity*, the Board noted that the agreement as a whole created confusion to a reasonable employee. In addition to "unexplained caveats" to the NLRB exception, there was also "an inherent ambiguity" in the agreement. The agreement had a waiver of any right to class or collective action. The Board held that this waiver would "clearly encompass" filing a Board charge "when that charge purports to speak to a group or collective concern." *Id.* at 6. In *Lincoln Eastern*, the Board similarly noted that "broad language" which forbade employees from participating in class or collective claims "might confuse employees about their ability to file unfair labor practice charges," as it "clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective concern." 364 NLRB No. 16 slip op. 3 (2016).

Here, ALJ Biblowitz determined that the Agreement similarly could be reasonably construed to prohibit the filing of, or participation in, an NLRB charge. The Agreement states in one paragraph that the Agreement does not prohibit claims at the NLRB, yet in the next paragraph states broadly that the employee "neither can join or participate as a member of a class or collective action that may have been instituted in court or in arbitration by a third-party." Joint Ex. 2, Attached Ex. 1, 2, 3 ¶¶ 11, 12. A reasonable employee could interpret the Agreement as a whole to prohibit her from, for example, participating in an unfair labor practice charge initiated by another employee. The Agreement's statement that the class prohibition applies only "to pursue any claims that are subject to arbitration under this Agreement" does not lend clarity

either, as rights under the NLRA often overlap with other employment laws. For example, assume Employee A had filed an unfair labor practice charge alleging that the employer had retaliated against employees for submitting a petition regarding violations of the Fair Labor Standards Act. Employee B may hesitate before participating in the charge as a witness, as FLSA claims are clearly "claims that are subject to arbitration under this Agreement." The conflict between the Agreement's NLRB exception in paragraph 11 and the Agreement's broad prohibition on participation in "collective action" instituted by a third party in paragraph 12 would lead a reasonable employee to understand that the Agreement affected participation in Board processes.

The Agreement is at the very least ambiguous as to whether it affects employees' rights to file Board charges. Ambiguous workplace rules that would reasonably be read by employees to have a coercive meaning are construed against the employer. *SolarCity Corp.*, slip op. at 6. citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d (D.C. Cir. 1999); *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011) Particularly when the Agreement provides for harsh penalties for wrongfully pursuing non-arbitral routes, including attorney's fees and costs for any enforcement action, such ambiguity would reasonably be expected to chill protected activity among employees. Joint Ex. 1, ¶¶ 14.

Thus, ALJ Biblowitz correctly determined that the Agreement is unlawful because employees would reasonably construe it to prohibit the filing of NLRB charges and/or participation in NLRB processes.

CONCLUSION

For all the above reasons, the Board should deny the Employer's exceptions to ALJ Biblowitz's Decision and adopt the Decision.

Dated: August 17, 2016
New York, New York

LEVY RATNER, P.C.

/s/ Ceilidh B. Gao
By: Ceilidh B. Gao
Attorneys for
Fast Food Workers Committee
80 Eighth Avenue Floor 8
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)
cgao@levyratner.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in accordance with NLRB Rules & Regulations §102.114(i), on this 17th day of August, 2016, a copy of the foregoing Charging Party Fast Food Workers Committee's Answering Brief to Respondent Briad Wenco's Exceptions in Case No. 29-CA-165942 was electronically filed and was sent to counsel for Respondent and counsel for the General Counsel by electronic mail, as set forth below:

Jason Pruzansky, Esq.
Davis & Gilbert, LLP
jpruzansky@dglaw.com

Annie Hsu, Esq.
NLRB Region 29
annie.hsu@nlrb.gov

LEVY RATNER, P.C.

/s/ Ceilidh B. Gao
By: Ceilidh B. Gao
Attorneys for Fast Food Workers Committee
80 Eighth Avenue, Floor 8
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)
cgao@levyratner.com

Dated: August 17, 2016
New York, New York